(3)

No. 90-892

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

THE CITY OF SEATTLE,

Petitioner,

v.

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED BY RESPONDENT

The question presented by the Petitioner City (Pet. (i)) deals with the merits if a Writ of Certiorari is granted. Respondent presents another question which must be answered first:

> Should the Supreme Court of the United States issue a Writ of Certiorari to the Supreme Court of the State of Washington to review its decision positively stating that the ordinances involved were unconstitutional under the United States Constitution and the Washington Constitution?

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In The

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THE CITY OF SEATTLE,

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FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON,

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Another document of importance which could be classed as an opinion is the Washington Supreme Court's Mandate to the King County Superior Court, which is unreported and is reproduced at Respondent's Appendix, page 1.

JURISDICTION

Respondent does not question the general jurisdiction of the United States Supreme Court to issue writs of certiorari to the Washington Supreme Court, but respondent questions the jurisdiction in this case to review the state court's holding that the ordinances in question are unconstitutional under the Washington Constitution, and to review a decision that is now moot. (See discussion later)

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

In addition to the provisions and ordinances listed by Petitioner (Pet. 2), another constitutional provision is clearly involved:

> (a)bsolute freedom of conscience in all matters of religious . . . worship . . . shall be guaranteed to every individual. Washington Constitution, Art.1, § 11 (Amend. 34)

COUNTERSTATEMENT OF THE CASE

No case citations are necessary to support the proposition that the issuance or denial of a writ of certiorari by the United States Supreme Court is discretionary. 32A Am Jur 2d 116, § 585, Scope of Review. This Court can grant or deny certiorari for any of its own reasons, and the Court may find several to consider in this case, but over time there have developed some reasons for denial,

couched in terms of jurisdiction in some cases, which respondent seeks to have the Court consider:

I.

STATE LAW DECISION

Respondent submits that this case is one which should not be accepted for certiorari because it contains a decision of the law of the State of Washington by the Washington Supreme Court. The conclusion paragraph of the Opinion reads:

> We hold that the Seattle Landmarks Preservation Ordinance 106348 and Seattle Ordinance 112425 designating First Covenant Church a landmark violate the Church's First Amendment rights under the United States Constitution and Washington's Const. Art.1, § 11 (Amend. 34).

Taking the foregoing language for its clear and unambiguous meaning, it is obvious that the Washington Court has made its determination of unconstitutionality with respect to *both* the United States and Washington Constitutions. The citation to the Washington Constitution is specific and independent.

Petitioner seeks to consider this as only a Federal case, and attempts to lead this Court to that conclusion by the manner in which the Washington Court's holding (supra) is paraphrased:

> The majority then held that Seattle's two ordinances infringed respondent's First Amendment right to free exercise of religion. (Pet. 7)

That statement completely and intentionally eliminates the holding with respect to the Washington Constitutional provision as if it wasn't there. The petitioner does the same thing again by stating that the respondent Church "filed a motion for partial summary judgment contending, *inter alia*, that the ordinances violated the Free Exercise Clause of the First Amendment to the United States Constitution." (Pet. 6)

That statement again by paraphrase eliminates the State Constitution question, which question was presented to the Superior Court in the Church's August 25, 1986 motion documents as follows:

> Do the First Amendment to the U.S. Constitution and Article 1, Section 11, as amended, of the Washington Constitution prohibit the application of the City of Seattle's Landmark Preservation Ordinance to active churches?

To the first of the foregoing statements (Pet. 7) deleting references to the State Constitution, the Petitioner inserts a footnote (no. 5) stating a conclusion:

> The Washington Supreme Court referred twice to the freedom of religion provision of the Washington Constitution. See App. 8a; 18a. (Actually there were four such references (including App. 1a and 4a) in the majority opinion and one in the dissent). However, the court relied exclusively on its understanding of this Court's First Amendment free exercise jurisprudence in reaching its decision. (Pet. 7), citing *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (hereinafter referred to as the *Long* case).

Respondent disputes that conclusion. There is nothing to support exclusive reliance on Federal law. The court clearly indicated by its references that it was

making Washington law as well. The only inferences in the direction of reliance on Federal law to the exclusion of the State law are the majority opinion's use of citations to many Federal cases, and the procedural presumption rule of the *Long* case. The presumption is that if a state court cites Federal cases rather than State cases, it is making a decision based on Federal law only, because it feels compelled to follow that law instead of State law, as a result of which the case is subject to U.S. Supreme Court review.

Basic law is clear. The *Long* case cites it (Footnote 1, p. 1038):

> Where the judgment of a state court rests upon two grounds, one of which is Federal and the other non-Federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.
>
> *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

The City's ordinances in question can be unconstitutional under both U.S. and Washington Constitutions. There may on some occasions be differences, which make a particular ordinance unconstitutional under one and not the other. The State of Washington law may lean more strongly toward protection of free exercise than Federal law. The question here is whether the Washington Court was making a decision of Washington law. If so, the Supreme Court has no jurisdiction.

Respondent's position is that the decision of State unconstitutionality was "independent and adequate". The *Long* procedural rule suffices in many cases to bridge a gap of uncertainty concerning the intention of a state

court, but the real inquiry is whether or not the state court was making an independent decision of and for state law, as well as an interpretation of Federal law.

The *Long* presumption can be offset by other evidence and factors. There is no question that Federal cases can be cited in State cases as persuasive precedents for State law. Long recognized that and suggested that any question about how the Federal cases were used be stated in the opinion. Unfortunately, no such statement was made in this case, but the writer of a State Supreme Court opinion would rarely be aware of that. Also, the *Long* case itself indicates that there may be circumstances where clarification might be necessary, despite the *Long* presumption (Footnote 6, p. 1041).

There are several indicators in the record of this case which show that the Washington Court was making an independent decision of Washington law construing the Washington Constitution:

a. The original complaint in this case, reproduced at Respondent's Appendix, p. 3, pleaded only the Washington Constitution, not the U.S. Constitution. It has never been amended.

b. The use of Federal cases started early in the development of this case, basically for lack of Washington authorities. In the City's first attack by Motion for Summary Judgment, it cited cases from the U.S. Supreme Court for its ripeness defense (See App. 6a), and both sides have used Federal cases as precedent ever since. That did not convert the case to a Federal case exclusively.

c. One reason for the use of Federal cases in the Court's opinion was the lack of pertinent

authority in Washington. That was obviously in the mind of the majority opinion writer who opened the opinion: "This is a case of first impression (App. 1a)".

d. The court did use Washington cases when it found them. In the first portion of the majority opinion (App. 4a-6a), concerning justiciable controversy, the Court cited 4 Washington cases. In the balance of the majority opinion concerning constitutionality 2 Washington cases were cited, and a Washington case the respondent relied on, *Sumner v. First Baptist Church*, 97 Wn2d. 1, 639 P.2d 1355 (1982) was cited, discussed, and considered controlling in the concurring opinion. (App. 22a-25a). There are no other Washington cases from which the court could have built the theories deciding the case. Federal cases are used, but that does not mean that the Court considered itself "compelled" by those cases. Even the *Long* case recognizes the use of Federal cases as precedent in the same way that precedent from all foreign jurisdiction are used. *Michigan v. Long*, 463 U.S. 1032, 1041. We submit that that is the way the Federal citations are used in this case.

e. Finally, while the State Supreme Court was still considering the Petitioner City's Petition for Reconsideration, the City made a Motion for Stay of Mandate "until the City secures a decision by the United States Supreme Court," claiming the potential of irreparable damage to churches. Upon denial of reconsideration, the Court required the Church to respond to the Motion to Stay. It did so, citing, *inter alia*, the following Washington cases and concluding:

Tukwila v. Nalder, 53 Wn.App. 739, 770 P.2d 659 (1989), at pp. 749-750:

Thus, while interpretation of the parallel federal constitutional provisions may provide guidance in interpreting our own, we must ultimately rely on the hierarchy of values and principles that have been developed under the Washington Constitution.

Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988), at p. 456:

[1] When parties allege violation of rights under both the United States and Washington Constitutions, this court will first independently interpret and apply the Washington Constitution in order, among other concerns, to develop a body of independent jurisprudence, and because consideration of the United States Constitution first would be premature.

Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982), at pp. 96-97:

However, the state courts are at liberty to find within the provisions of their own constitutions a greater protection than is afforded under the federal constitution, as interpreted by the United States Supreme Court. *Oregon v. Hass*, 420 U.S. 1714, 1719, 43 L.Ed.2d 570, 95 S.Ct. 1215 (1975); *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980); *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982).

Insofar as the Washington Constitution is concerned, *the case has been decided.* The landmark ordinances in question are unconstitutional as to churches. That decision will not change, no matter what the

> U.S. Supreme Court says. There is no reason to delay the mandate. It should issue immediately. (End of quotation)

The Motion for Stay was denied by Order dated October 17, 1990, copy reproduced as Respondent's Appendix, p. 8. That action certainly supports the proposition that the Washington Supreme Court was acting independently in regard to its application of the Washington Constitution.

The following quotation from 32A Am Jur 2d 167 § 670, is pertinent here:

> *It is well accepted that the Supreme Court of the United States will not review a decision of a state court resting upon adequate and independent non-federal grounds.* This rule is applied whether a case is brought to the Supreme Court by means of appeal or certiorari.
>
> The rule that the Supreme Court has no jurisdiction to review a case *if the judgment is supported by adequate state ground is based on the observation that the adequate state ground controls the result in the case, no matter what the Supreme Court may say about the merits of the federal issue. In such a case, anything which the Supreme Court could say on the federal issue would only be an advisory opinion.* And the Supreme Court has said that it does not have jurisdiction to render an advisory opinion under such circumstances, or to correct statements in state court opinions which do not affect the final outcome of a case, even though a state court's opinion may reflect an erroneous view of federal law.
>
> (Numerous footnote citations)
>
> (Emphasis ours)

Concluding the State Law Decision portion of this brief, respondent submits that the State Supreme Court has made an adequate and independent decision concerning the unconstitutionality of the questioned ordinances under Washington law, the *Long* procedural presumption notwithstanding. Therefore, this court should deny certiorari.

An opposite opinion to the foregoing by the Supreme Court would only determine that the Supreme Court has jurisdiction to grant certiorari, but it would not compel certiorari. The Court could still deny it for whatever reason it wishes.

II.

MOOTNESS

Following the denial of the Petitioner's Motion to Stay (Resp. App. 8); the Washington Supreme Court on October 19, 1990, issued its Mandate to the King County Superior Court, copy reproduced as Respondent's Appendix, p. 1. Pursuant to that Mandate, the Declaratory Judgment of the King County Superior Court declaring the two ordinances void as to First Covenant Church was entered on November 9, 1990, copy reproduced as Respondent's Appendix, p. 9. No appeal has been taken from the Judgment.

Insofar as the First Covenant Church case is concerned, the Superior Court's final decree has been entered. The case is over. There is nothing pending in that court at all. First Covenant Church is no longer a landmark. Nothing can change that since the judgment was

entered pursuant to the Washington Supreme Court's decision and mandate under the Washington Constitution.

The effect of mootness is described at 32A Am Jur 2d 823, § 331, as follows:

> A federal appellate court has no power to determine the merits of a question which has become moot. This prohibition is based on the requirement of Article III of the Constitution, which provides that the judicial power of the United States shall extend only to cases and controversies. Consequently, *a federal appellate court cannot decide a moot question, because a decision on a moot question constitutes an advisory opinion,* given in an abstract context, which cannot affect the rights of the litigants in the case before the court. Instead, review is only permitted where the judgment of the appellate court will have some material effect, will resolve a real and substantial controversy between adverse parties, and will result in the granting of relief.
>
> (Footnoting numerous cases)
>
> (Emphasis ours)

III.

HANDICAP TO REVIEW

One of the handicaps to an effective review of this case, that the respondent can foresee, is that there has been no trial for the establishment of facts. The only facts in the record, which are very few, were produced by affidavit for Summary Judgment arguments. The Petitioner prevented a trial by its Motions for Summary Judgment.

IV.

MISCELLANEOUS

1. *Scope of Brief.* After taking the position that this was only a Federal case, and citing the *Long* case (Pet. 7), the Petitioner continues briefing by citing cases opposing the Washington Court's holding of unconstitutionality. That would be the matter before the Court if certiorari is granted, fully briefed and argued then. Respondent will not attempt to answer that portion in this Brief.

2. *The St. Bart. Case.* This is one exception to the last preceding paragraph. The petitioner relies heavily on *St. Bartholemew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990). (Pet. 10, 11, 12, 14, 16). A careful reading of that case shows how intimately and intrusively the Landmarks Board, experts, Courts, and witnesses probed into the detailed affairs of the Church in a landmark case. It is the best example of why landmark legislation should not apply to churches.

3. *The Society of Jesus Case.* In footnote 11 at Pet. 17, the case of *Society of Jesus in New England v. Boston Landmarks Comm'n.*, S.J.C. No. S-5414, was shown to have similar issues pending. Since that entry, the case has been decided. The landmark designation of the interior of the church was declared to be unconstitutional under Massachusetts law. The reasoning is remarkably similar to that in the First Covenant Church opinion, including the following:

> The government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance. In short,

under our hierarchy of constitutional values we must accept the possible loss of historically significant elements of the interior of this church as the price of safeguarding the right of religious freedom.

CONCLUSION

For the foregoing reasons, and any others the Court may consider, respondent urges the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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RESPONDENT'S APPENDIX

THE SUPREME COURT OF WASHINGTON

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON, Appellant, v. THE CITY OF SEATTLE, Respondent.	MANDATE No. 56377-2 King County No. 862011790

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on March 22, 1990, became the decision terminating review of this court in the above entitled cause on October 17, 1990. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: Costs will be taxed by Supplemental Judgment.

(SEAL)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 19th day of October, 1990.

/s/ C. J. Merritt
C. J. MERRITT
Clerk of the Supreme Court,
State of Washington

cc: Mr. Gordon Clinton
Mr. Arthur Wendells
Hon. Mark Sidran
Mr. Robert Tobin, Asst.
Reporter of Decisions

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON, a non-profit corporation, Plaintiff, v. THE CITY OF SEATTLE, a Washington municipal corporation, Defendant.	NO. 86-2-01179-0 COMPLAINT FOR DECLARATORY JUDGMENT

JURISDICTIONAL ALLEGATIONS

1. The First Covenant Church of Seattle, Washington, is a Washington corporation incorporated under the provisions of RCW, Title 24, and it is in good standing with the Secretary of State of the State of Washington. The said church is the owner and occupant of the church structure located at Pike and Bellevue in the city of Seattle, which is the subject of the Landmark designation herein complained of.

2. The Defendant, The City of Seattle, is a Washington municipal corporation having legislative powers and duties as prescribed by the laws of the State of Washington. The City of Seattle is located within King County, Washington.

FACTUAL ALLEGATIONS

3. First Covenant Church is a religious organization. It is currently active with a full religious program. Its

church structure at Pike and Bellevue is devoted solely to uses related to the religious program of the Church.

4. The City of Seattle has adopted Ordinance No. 106348, the Seattle Landmarks Preservation Ordinance, copy of which is attached as Exhibit A.

5. Under purported authority of said Ordinance, the church structure owned by the Plaintiff, First Covenant Church, was nominated as a Landmark. The Church opposed the nomination through the procedural provisions prescribed by the Ordinance up through a Hearing Officer's Findings and Recommendation, and to Appeal thereof to the City Council.

6. On September 9, 1985, the City Council denied the Appeal of First Covenant Church, by the adoption of Ordinance No. 112425, copy of which is attached as Exhibit B, the result of which was to impose controls on the use of the property of First Covenant Church as prescribed in section 2 thereof.

7. The effects of the designation of First Covenant Church as a Landmark will be:

a. To limit the right and opportunity of First Covenant Church to make changes on the exterior of the building for the promotion of its religious mission without secular evaluation and approval by the city.

b. To severely limit the market for the building to only those who can use a church structure, in the event that First Covenant Church at any time should decide to sell.

c. To substantially reduce the market value of the property in the event the church should wish to sell.

CONSTITUTIONAL QUESTIONS

8. Application of the city's Landmark Preservation Ordinance to First Covenant Church is unconstitutional in that it violates the religious freedom provisions of Amendment 34 to the Constitution of the State of Washington.

9. Application of the city's Landmark Preservation Ordinance to First Covenant Church is unconstitutional in that it violates the equal privileges provisions of Article I, section 12, of the Constitution of the State of Washington. The said Ordinance provides for "incentives" as consideration for the imposition of controls. Incentives cannot be granted to churches in the same manner as they can to other types of buildings and owners. No incentives were granted to the Plaintiff.

10. Application of the city's Landmark Preservation Ordinance to First Covenant Church is unconstitutional as a violation of the provisions of Amendment 9 to the Constitution of the State of Washington prohibiting the taking of private property for public use without just compensation.

ORDINANCE CONSTRUCTION

11. By reading the Ordinance as a whole, and Section 9.05 in particular, the only reasonable construction is that the Ordinance was not intended to apply to a church. To so apply it, is contrary to the language and meaning of the Ordinance.

12. The designation of First Covenant Church as a Landmark was based on the criterion set forth as Section 3.01 (6) of the ordinance reading as follows:

Because of its prominence of spatial location, contrasts of siting, age, or scale, it is an easily identifiable visual feature of its neighborhood or the city and contributes to the distinctive quality or identity of such neighborhood or the city; Said criterion is ambiguous and so vague that designation pursuant thereto is a totally arbitrary function, contrary to standards required of ordinances affecting property rights.

ARBITRARY ACTION

13. The action of the City Council of the City of Seattle in approving the designation of First Covenant Church as a Landmark and imposing the controls as hereinbefore set forth was arbitrary and capricious, contrary to the City Council's own Ordinance No. 106348, contrary to the procedural provisions of said Ordinance, without due process, and contrary to law.

14. The action of the City Council in imposing controls in the form heretoforth dated has been arbitrary and capricious, in that the stated control exempting "changes in liturgy" creates a new ambiquity [sic] calling for arbitrary action in the future.

Wherefore, Plaintiff prays for judgment declaring:

a. That the application of City of Seattle Ordinance No. 106348 to churches is unconstitutional under the Constitution of the State of Washington; and

b. That the action of the Seattle City Council in declaring the structures of First Covenant Church of Seattle to be a Landmark is void.

c. That the Plaintiff have its costs and disbursements to be taxed, including reasonable attorney's fees.

DATED this 21st day of January, 1986.

WENDELLS, FROELICH, POWER & LAKEFISH

By /s/ A. T. Wendells
A. T. Wendells

CLINTON, FLECK AND GLEIN

By /s/ Gordon S. Clinton
Gordon S. Clinton
Attorneys for Plaintiff

THE SUPREME COURT OF WASHINGTON

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON, Appellant, v. THE CITY OF SEATTLE, Respondent.	NO. 56377-2 ORDER DENYING RESPONDENT'S MOTION FOR STAY OF MANDATE

Respondent's MOTION FOR STAY OF MANDATE and Appellant's RESPONSE to the motion were considered by the Chief Justice.

Now, therefore, it is hereby

ORDERED:

The MOTION FOR STAY OF MANDATE is denied.

DATED at Olympia, Washington this 17th day of October, 1990.

/s/ Keith M. Callow
CHIEF JUSTICE

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON, a non-profit corporation, Plaintiff, vs. THE CITY OF SEATTLE, a Washington municipal corporation, Defendant.	NO. 86-2-01179-0 DECLARATORY JUDGMENT

This matter having come on regularly before the undersigned upon the Motion of the Plaintiff for Entry of Judgment Pursuant to Washington Supreme Court Mandate, counsel for the Plaintiff and the Defendant City of Seattle being present, and the court having examined the files and records herein, together with the Mandate and opinion of the Supreme Court of the State of Washington, now therefore:

It is hereby Declared, Adjudged, and Decreed that the application of City of Seattle Ordinance Number 106348, the Seattle Landmarks Preservation Ordinance, to First Covenant Church is unconstitutional under the First Amendment of the United States Constitution and Article 1, Section 11 (Amend. 34) of the Washington Constitution; and

It is further Declared, Adjudged, and Decreed that City of Seattle Ordinance Number 112425 designating First Covenant Church as a Landmark and imposing controls is unconstitutional and void; and

It is hereby Adjudged and Decreed that Plaintiff have its costs and disbursements to be taxed.

Done in open court this 9th day of November, 1990.

/s/ Nancy Ann Holman
JUDGE
JUDGE NANCY ANN HOLMAN

Presented by:

/s/ A. T. Wendells
A. T. Wendells
of Attorneys for Plaintiff

Copy Received and
Notice of Presentation
Waived.

MARK H. SIDRAN
Seattle City Attorney

By /s/ Robert D. Tobin
Robert D. Tobin
Assistant City Attorney